Asia Commercial Finance (M) Bhd v JB Precision Moulding Industries Sdn Bhd (In liquidation)

FEDERAL COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-750-93
CHONG SIEW FAI CJ (SABAH & SARAWAK), MOHD AZMI AND WAN ADNAN FCJJ
1 MARCH 1996

Companies and Corporations — *Winding up — Creditors — Lessee provided deposit sum as security in lease agreement — Evinced by memorandum of security deposit dated 16 August 1988 — Lessor did not register memorandum under Companies Act — Lessee company wound up — Whether non-registration rendered the memorandum of security deposit void — Whether lessor was 'secured creditor' as defined by s 2 of Bankruptcy Act 1967 —Whether lessor held lien on property as security for debt due to it from lessee — Bankruptcy Act 1967 s 2, Companies Act 1965 ss 108(3) & 219(2)*

Companies and Corporations — *Winding up — Commencement — Whether date of presentation of winding-up petition was deemed date of commencement of winding up — Companies Act 1965 s 219(2)*

Words and Phrases — *'Secured creditor' — Bankruptcy Act 1967 s 2*

On 16 August 1988, the appellant ('the lessor') entered into an equipment lease agreement ('the agreement') with the respondent ('the lessee') whereby the lessor leased a plastic moulding machine to the lessee for 25 months from 16 August 1988 to 15 September 1990, at a monthly rental of RM1,605. As security, the lessee provided a sum of RM26,691 ('the security sum'), being the aggregate of security deposit RM25,086 and prepaid rental of RM1,605, to the lessor. The deposit sum was evinced by a memorandum of security deposit dated 16 August 1988 ('the memorandum'). Clause 11.3 of the agreement also provided, inter alia, that if the lessee was in default under any of the provisions of the agreement, the lessor would be entitled to apply the deposit and/or prepaid rent against any arrears of rent. However, the lessor did not register the memorandum under s 108(1) of the Companies Act 1965 ('the Companies Act'). The lessee later defaulted in its payment. Meanwhile, on 2 December 1989, a winding-up petition was presented against the lessee. On 4 April 1990, a winding-up order was made, and a liquidator was appointed. On 26 April 1993, the liquidator applied by an originating motion in the name of the lessee for the return of the security sum. However, the lessor alleged that it was a secured creditor within the meaning of the term under the Bankruptcy Act 1967 ('the Bankruptcy Act') and the Companies Act, and that it had set-off the security deposit against the sum due and owing by the lessee amounting to RM33,518.28 as at 4 August 1993. The lessee, on the other hand, alleged that the lessor was not a secured creditor, and thus had to return the security sum for distribution under s 292 of the Companies Act. It was further argued that the lessor's act of

setting off the security sum amounted to an undue preferential treatment of creditor, and was therefore void under s 293 of the Companies Act. The High Court judge decided in favour of the lessee, holding that: (i) the memorandum was not void against the liquidator of the lessee; (ii) the lessor did not qualify as a secured creditor as defined in s 2 of the Bankruptcy Act (which definition was applicable to the winding up of companies) because it did not hold a lien on the property or any part thereof as security for a debt due to it from the lessee; and (iii) the set-off effected by the lessor on 4 August 1993 was void under ss 223 and 293 of the Companies Act. The judge accordingly ordered the return of the security sum to the liquidator of the lessee. The lessor appealed.

Held, allowing the appeal with costs:

(1) The memorandum need not be registered under s 108 of the Companies Act 1965 since sub-para (k) of s 108(3) that applied to documents of such nature did not come into effect until 25 September 1993 while the other sub-paras of the said s 108(3) in force at the material time on 16 August 1988 had no application. Hence, the judge was right in holding that the memorandum was not void by reason of non-registration under s 108(1) of the Companies Act (see p 7F).

(2) By virtue of s 219(2) of the Companies Act, the winding up shall be deemed to have commenced on the date of the presentation of the winding-up petition. Thus, whether there was an existing debt to constitute a lien to come within the term 'secured creditor' as defined in s 2 of the Bankruptcy Act in this case, depended on whether there was any debt due to the lessor from the lessee at the time of the presentation of the winding-up petition, provided a winding-up order was made by the court. It was also essential that the debt was due from the debtor (lessee) to the creditor (lessor) (see p 8E); *Re Perkins, ex p Mexican Santa Barbara Mining Co* (1890) 24 QBD 613 followed.

(3) In this case, pursuant to s 219(2), the winding up was deemed to have commenced on the date of the presentation of the winding-up petition, ie 2 December 1989. From the evidence, it was obvious that the lessee was owing the lessor at least two instalments of rentals on that day. Therefore, there existed a debt owing by the lessee to the lessor on 2 December 1989. It followed that there was a lien within the term of 'secured creditor' under s 2 of the Bankruptcy Act, and the lessor was a secured creditor on 2 December 1989 (see p 9C–I).

(4) Independent of the definition of secured creditor contained in s 2 of the Bankruptcy Act, the lessee was nonetheless entitled to hold the memorandum as security for payment of the arrears of instalment rentals owing. The deposit was placed as security for the performance of the terms and conditions of the agreement

and was refundable at the expiry of the agreement but only upon full satisfaction of the terms and conditions therein contained. As the lessee had breached the terms of the lease agreement through its acts, the lessor was entitled to hold the deposit of RM25,086 paid under the memorandum of security deposit and the prepaid rental of RM1,605 as security and that the lessor was a secured creditor to the extent of the deposit and the prepaid rental which amounted to RM26,691 (see pp 10B–I and 11A–D).

(5) In light of the validity of the set-off by the lessor, there was no substance in the contention of the lessee that there had been undue preference in favour of the lessor under s 293 of the Companies Act rendering the set-off liable to be avoided (see p 11E).

[Bahasa Malaysia summary

Pada 16 Ogos 1988, perayu ('pemberi pajak') telah mengikat suatu perjanjian pajak kelengkapan ('perjanjian tersebut') dengan penentang ('penerima pajak') di mana pemberi pajak telah menyewa sebuah mesin pembentuk plastik kepada penerima pajak untuk 25 bulan dari 16 Ogos 1988 hingga 15 September 1990, pada kadar sewa bulanan sebanyak RM1,605. Sebagai cagaran, penerima pajak telah membayar sejumlah RM26,691 ('jumlah cagaran'), yang merupakan jumlah deposit cagaran sebanyak RM25,086 and sewa pendahuluan sebanyak RM1,605, kepada pemberi pajak. Deposit cagaran telah diperlihatkan melalui satu memorandum deposit cagaran bertarikh 16 Ogos 1988 ('memorandum tersebut'). Fasal 11.3 perjanjian tersebut juga telah memperuntukkan, antara lain, bahawa jika penerima pajak ingkar di bawah sebarang peruntukan perjanjian tersebut, pemberi pajak adalah berhak untuk menggunakan deposit dan/atau sewa yang dibayar terdahulu terhadap sebarang tunggakan sewa. Walau bagaimanapun, pemberi pajak tidak mendaftarkan memorandum tersebut di bawah s 108(1) Akta Syarikat 1965 ('Akta Syarikat'). Penerima pajakan kemudiannya ingkar dalam pembayarannya. Sementara itu, pada 2 Disember 1989, satu petisyen penggulungan telah dikemukakan terhadap penerima pajak. Pada 4 April 1990, satu perintah penggulungan telah dibuat, dan seorang penyelesai dilantik. Pada 26 April 1993, penyelesai telah memohon melalui satu usul pemula atas nama penerima pajak untuk pemulangan jumlah cagaran. Walau bagaimanapun, pemberi pajak berhujah bahawa ia adalah suatu pemiutang bercagar dalam maksud terma di bawah Akta Kebankrapan 1967 ('Akta Kebankrapan') dan Akta Syarikat, dan bahawa ia telahpun menolak deposit cagaran sejumlah RM25,086 daripada jumlah tertunggak yang harus dibayar dan terhutang oleh penerima pajak, sebanyak RM33,518.28 pada 4 Ogos 1993. Penerima pajak pula berhujah bahawa pemberi pajak bukan pemiutang bercagar, dan oleh itu harus memulangkan jumlah cagaran tersebut untuk pembahagian

di bawah s 292 Akta Syarikat. Adalah juga dihujahkan bahawa tindakan pemberi pajak menolak jumlah cagaran tersebut sama seperti satu layanan keutamaan pemiutang yang tak wajar, dan dengan itu adalah terbatal di bawah s 293 Akta Syarikat. Hakim Mahkamah Tinggi membuat keputusan yang memihak kepada penerima pajak, dan memutuskan bahawa: (i) memorandum tersebut adalah tidak terbatal terhadap penyelesai penerima pajak; (ii) pemberi pajak tidak layak sebagai suatu pemiutang bercagar sebagaimana yang ditakrifkan di bawah s 2 Akta Kebankrapan (di mana takrifannya terpakai dalam penggulungan syarikat) kerana ia tidak memegang suatu lien ke atas harta atau sebarang bahagian daripadanya sebagai cagaran untuk suatu hutang yang terhutang kepadanya oleh penerima pajak; dan (iii) tolakan yang dibuat oleh pemberi pajak pada 4 Ogos 1993 adalah terbatal di bawah ss 223 dan 293 Akta Syarikat. Hakim seterusnya telah memerintahkan pemulangan jumlah cagaran kepada penyelesai penerima pajak. Pemberi pajak membuat rayuan.

Diputuskan, membenarkan rayuan dengan kos:

(1) Memorandum tersebut tidak perlu didaftarkan di bawah s 108 Akta Syarikat kerana sub-perenggan (k) di bawah s 108(3) yang terpakai terhadap dokumen sedemikian belum dikuatkuasakan sehingga 25 September 1993, sementara sub-perenggan lain di bawah s 108(3) yang berkuatkuasa pada masa material iaitu pada 16 Ogos 1988, tidak terpakai. Oleh itu, hakim adalah betul dalam menyatakan bahawa memorandum tersebut tidak terbatal akibat tidak didaftarkan di bawah s 108(1) Akta Syarikat (lihat ms 7F).

(2) Mengikut s 219(2) Akta Syarikat, penggulungan adalah disifatkan sebagai telah bermula pada tarikh pengemukaan petisyen penggulungan. Oleh itu, sama ada terdapat hutang yang wujud yang membentuk lien supaya ia dirangkumi oleh terma 'pemiutang bercagar' seperti yang telah ditakrifkan dalam s 2 Akta Kebankrapan dalam kes ini, bergantung kepada sama ada terdapat sebarang hutang yang harus dibayar kepada pemberi pajak daripada penerima pajak pada masa pengemukaan petisyen penggulungan, dengan syarat bahawa suatu perintah penggulungan telah dibuat oleh mahkamah. Juga, adalah penting bahawa terdapat hutang yang harus dibayar oleh penghutang (penerima pajak) kepada pemiutang (pemberi pajak) (lihat ms 8E); *Re Perkins, ex p Mexican Santa Barbara Mining Co* (1890) 24 QBD 613 diikut.

(3) Dalam kes ini, menurut s 219(2) Akta Syarikat, penggulungan adalah disifatkan sebagai telah bermula pada tarikh pengemukaan petisyen, iaitu pada 2 Disember 1989. Daripada keterangan, adalah jelas bahawa penerima pajak berhutang dengan pemberi pajak sekurang-kurangnya dua bayaran ansuran sewa pada hari tersebut. Oleh itu, terdapat hutang oleh penerima pajak kepada pemberi pajak pada 2 Disember 1989. Ekoran itu, terdapat satu lien dalam lingkungan terma 'pemiutang bercagar' di bawah s 2

A Akta Kebrankapan dan pemberi pajak adalah pemiutang bercagar pada 2 Disember 1989 (lihat ms 9C–I).

(4) Tanpa bergantung kepada takrif penghutang bercagar seperti yang termaktub dalam s 2 Akta Kebankrapan, penerima pajak masih berhak untuk memegang memorandum tersebut sebagai B cagaran untuk pembayaran tunggakan ansuran yang terhutang. Deposit berkenaan telah diberikan sebagai cagaran bagi pelaksanaan terma dan syarat perjanjian pajak tersebut dan boleh dibayar balik pada penamatan perjanjian pajak tersebut tetapi hanya jika terma dan syarat yang terkandung di dalam perjanjian C dipatuhi sepenuhnya. Oleh kerana penerima pajak telah memungkiri terma-terma perjanjian pajak tersebut melalui tindakannya, pemberi pajak adalah berhak untuk memegang deposit yang berjumlah RM25,086 yang dibayar di bawah memorandum tersebut dan bayaran sewa pendahuluan yang berjumlah RM1,605 sebagai cagaran, dan bahawa pemberi pajak D adalah suatu pemiutang bercagar sejauh mana ia adalah berkenaan dengan deposit dan bayaran sewa pendahuluan yang berjumlah RM26,691 (lihat ms 10B–I and 11A–D).

(5) Memandangkan kesahan tolakan yang dibuat oleh pemberi pajak, tidak terdapat kebenaran dalam hujahan penerima pajak bahawa E terdapat keutamaan tak wajar yang memihak kepada pemberi pajak di bawah s 293 Akta Syarikat supaya tolakan itu boleh dielakkan (lihat ms 11E).]

Notes

F For cases on winding up, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 399–570.

Cases referred to

Lian Keow Sdn Bhd (In liquidation) & Anor v Overseas Credit Finance G *(M) Sdn Bhd & Ors* [1988] 2 MLJ 449

Perkins, ex p Mexican Santa Barbara Mining Co, Re (1890) 24 QBD 613

Legislation referred to

H Bankruptcy Act 1967 ss 2, 41, 44
Civil Law Act 1956 s 4(1)
Companies Act 1965 ss 108, 219(2), 292, 293

Appeal from: Originating Motion No 16–1993 (High Court, Johor I Bahru)

John Clark Sumugod (*Sidek Teoh Wong & Dennis*) for the appellant.
Ong Ban Chai (*Ong Ban Chai & Co*) for the respondent.

Cur Adv Vult

Chong Siew Fai CJ (Sabah & Sarawak) (delivering the judgment of the court): In the High Court at Johore Bahru, the learned trial judge ordered the appellant, Asia Commercial Finance (M) Sdn Bhd (hereinafter referred to as 'the lessor') to refund to the respondent, JB Precision Moulding Industries Sdn Bhd (In liquidation) (hereinafter referred as 'the lessee') a sum of RM26,691 (hereinafter referred to as 'the security sum'), being the aggregate of security deposit RM25,086 and prepaid rental of RM1,605. (See [1994] 1 MLJ 734). Being dissatisfied with the decision, the lessor appeals.

The relevant facts may be summarized as follows:

(a) By an equipment lease agreement dated 16 August 1988 (hereinafter referred to as 'the lease agreement'), the lessor let to the lessee a plastic moulding machine for 25 months from 16 August 1988 to 15 September 1990 at a monthly rental of RM1,605 payable on or before the 16th of each month commencing from 16 August 1988.

(b) Pursuant to cl 11 of the lease agreement, the lessee deposited with the lessor the security sum as security for the due observance and performance by the lessee of the stipulations, terms and conditions contained in the lease agreement. The amount RM25,086 deposited was evinced by a 'memorandum of security deposit' dated 16 August 1988.

(c) From the affidavit evidence, the lessee had paid 17 monthly rentals out of the 25-month lease, and according to the lessor's statement of account exh ACF4 (at p 85 of the appeal record) which was unchallenged, all these monthly rentals were paid after the agreed stipulated times, ie later than the 16th of each month in which the rental was due and payable, except that for the first month which was paid on 16 August 1988.

(d) On 2 December 1989, a winding-up petition was presented against the lessee. On 4 April 1990, a winding-up order was made and a liquidator was appointed. On 11 September 1990, the liquidator demanded from the lessor the return of the security sum RM26,691. The lessor refused to comply, contending that it was a secured creditor within the meaning of the term under the Bankruptcy Act 1967 and the Companies Act 1965.

(e) There is no evidence that the lessee or the liquidator had at any time terminated the lease agreement. On the other hand, the undisputed evidence shows that the liquidator had consented to the repossession of the moulding machine by the lessor on 22 December 1990 because of the lessee's default in paying the monthly rentals.

(f) According to the lessor (and this was uncontradicted), the amount due and owing by the lessee as at 4 August 1993 was RM33,518.28 inclusive of such miscellaneous items as insurance premium, costs of repossession, storage fee and so forth. The lessor thus set off the security deposit RM25,086 against the amount outstanding RM33,518.28.

By originating motion dated 26 April 1993, the liquidator applied in the name of the lessee for the return of the security sum RM26,691 alleging that the lessor not being a secured creditor had to return the security sum for distribution under s 292 of the Companies Act 1965 and that the lessor's act of setting off the security amounted to an undue preferential treatment of creditor and was, therefore, void under s 293 of the Companies Act 1965.

At the trial in the High Court, the learned trial judge found:

(1) that the 'memorandum of security deposit' dated 16 August 1988 was 'not void against the liquidator of the applicant company' (ie the lessee);

(2) that the lessor did not qualify as a 'secured creditor' as defined in s 2 of the Bankruptcy Act 1967 which definition was applicable to the winding up of companies; and

(3) that the set-off effected by the lessor on 4 August 1993 was void under ss 223 and 293 of the Companies Act 1965.

The learned trial judge accordingly ordered the return of the security sum to the liquidator of the lessee.

It is now necessary to consider the reasons upon which the learned trial judge came to his findings.

(1) *Validity of the 'Memorandum of Security Deposit'*

The point as to the requirement of registering the 'memorandum of security deposit' under s 108 of the Companies Act 1965 was not raised before us. In any event, we agree with the learned trial judge that the said memorandum which was dated 16 August 1988 need not be so registered since sub-para (k) of s 108(3) that applied to a document in the nature of the said memorandum did not come into effect until 25 September 1993 while the other sub-paras of the said s 108(3) in force at the material time on 16 August 1988 had no application. Accordingly, we accept that the said memorandum is not void by reason of non-registration under s 108(1) of the Companies Act 1965.

(2) *The lessor: a 'secured creditor'?*

The learned trial judge held that the lessor was not a 'secured creditor' as defined in s 2 of the Bankruptcy Act 1967 because it did not hold a 'lien' on the property of the lessee or any part thereof as a security for a debt due to it from the lessee. The term 'secured creditor' is defined in s 2 of the Bankruptcy Act 1967 thus:

> 'secured creditor' means a person holding a mortgage, charge or lien on the property of the debtor or any part thereof as a security for a debt due to him from the debtor but shall not include a plaintiff in any action who has attached the property of the debtor before judgment.

The learned trial judge held that by virtue of s 4(1) of the Civil Law Act 1956 and the principles laid down in *Lian Keow Sdn Bhd (In liquidation) & Anor v Overseas Credit Finance (M) Sdn Bhd & Ors* [1988] 2 MLJ 449

(SC), the definition of 'secured creditor' in s 2 of the Bankruptcy Act 1967 applied to the winding up of companies. A

The learned trial judge found that there existed no element of any debt due from the lessee to the lessor at the time when the memorandum of deposit dated 16 August 1988 was executed. Accordingly, the learned trial judge held that the lessor did not hold a 'lien' thereby falling within the definition of 'secured creditor', and could not therefore, be holding the memorandum of deposit as a security for a debt to qualify as a 'secured creditor'. Consequently, the purported set-off by the lessor the sum of RM26,691 under the memorandum of deposit was an undue preferential payment to creditor under s 293 of the Companies Act 1965. B C

With respect, we do not agree. The memorandum of security deposit dated 16 August 1988 was to secure the performance of the terms and conditions contained in the lease agreement by the lessee. It was also stated in the said memorandum that the sum deposited was refundable (to the lessee) '... at the expiry of the said agreement and only on complete satisfaction of each and every term and condition contained therein'. The 'said agreement' relates to the lease agreement. D

In the context of the present case, whether there was an existing debt to constitute a 'lien' to come within the term 'secured creditor' as defined in s 2 of the Bankruptcy Act 1967 depends on whether there was any debt due to the lessor from the lessee at the time of the presentation of the winding-up petition, provided a winding-up order was made by the court. This is because s 219(2) of the Companies Act 1965 provides: E

> In any other case the winding up shall be deemed to have commenced at the time of the presentation of the petition for the winding up.

It is essential that the debt must be due from the debtor (lessee) to the creditor (lessor). In *Re Perkins, ex p Mexican Santa Barbara Mining Co* (1890) 24 QBD 613 (CA), the company presented a bankruptcy petition against the debtor. It turned out that the debtor had obtained a judgment declaring that one of the registered shareholders of the company was a trustee of some of his shares for the debtor. The company was not bound to recognize trusts of their shares and its articles of association provided that it should 'have a first and paramount lien on all shares, and on the dividends thereon, for all money due to, and liabilities subsisting with, the company from or on the part of the registered holder or holders thereof, or other the person for the time being entitled thereto as against the company'. It was held that the company had no lien upon the shares for the debt due to it from the debtor, and was not 'secured creditor' of the debtor within the meaning of the Bankruptcy Act 1967. On the term 'secured creditor' which was defined as 'a person holding a mortgage, charge, or lien, on the property of the debtor, or any part thereof, as a security for a debt due to him from the debtor' (which, so far as quoted above, was identical to the definition of the term in s 2 of the Bankruptcy Act 1967 (Malaysia)), Lord Esher MR commenting on the words 'from the debtor' said (at p 619): F G H I

> We must give effect to those words. The question here is not whether this lien is a security to the company as against Dickey, but whether it is a

> security for a debt due to the company from the debtor. I think it cannot in fairness be said to be a lien in respect of a debt due to the company from the debtor, and, therefore, although in one sense it is a security in their hands, it is not such a security as makes them 'secured creditors' of the debtor within the meaning of the Act. This new definition shuts that lien out. Therefore, although I agree with the registrar that the company had a lien, I cannot agree that that lien, which was a lien against Dickey, was such a lien as made them 'secured creditors' of the debtor, for the lien as against Dickey was not a security for a debt due to them from the debtor.

In our instant case, the winding up order was made on 4 April 1990. By virtue of s 219(2) of the Companies Act 1965, the winding up was deemed to have commenced on the date of the presentation of the winding-up petition, that is, on 2 December 1989.

This brings us to the important question of whether the lessee was owing any debt to the lessor as at 2 December 1989, the date of the presentation of the winding-up petition.

The learned trial judge in his judgment seemed to have found that nothing was owing on 2 December 1989. He said:

> There were attempts by the respondent's counsel [ie counsel for the lessor] to argue that subsequently a debt existed between the applicant company and the respondent when the applicant company defaulted in their rental payments. This would trigger off the memorandum of deposit and turned it into a lien with an element of a debt. However, this argument does not overcome the fact that when the debt came into existence, presumably in December 1990 when the respondents repossessed the equipment, the petition for winding up of the applicant company had already been presented and a winding-up order made.

With respect, there was, here, a failure to appreciate the evidence mainly owing to failure on the part of counsel to bring to the attention of the learned trial judge the material evidence on the instalment payments made. At the hearing of this appeal, we pointed out, and counsel for the lessee conceded, that from the statement of accounts exhibited by the lessor (exh ACF4), the 15th and 16th monthly rentals were not paid until 7 December 1989 and 13 January 1990, respectively. Item 7 of the schedule to the said lease agreement stipulated that the 25 monthly rentals were to be paid on the 16th day of each month commencing from 16 August 1988 and thereafter, on the same day of each successive month. Thus, the 15th rental payment should have been paid by 16 October 1989 and the 16th payment, by 16 November 1989. That being so, it is obvious that, by virtue of the deeming provision in s 219(2) of the Companies Act 1965, on the date of the presentation of the winding-up petition on 2 December 1989, the lessee was owing the lessor at least two instalments of rentals. Therefore, there existed a debt owing by the lessee to the lessor on 2 December 1989. Hence, there was a 'lien' within the term of 'secured creditor' under s 2 of the Bankruptcy Act 1967, and the lessor was a 'secured creditor' on 2 December 1989.

Counsel for the lessee argued that there was waiver or estoppel since those two instalments were accepted albeit paid late, ie after the making of

the winding-up order. We are unable to accept the contention. The question is whether there existed an unpaid debt on 2 December 1989. If it existed (as we find it did), the subsequent payment does not alter the fact of its existence at the material time, ie 2 December 1989.

Furthermore, we are also of the view that independent of the definition of 'secured creditor' contained in s 2 of the Bankruptcy Act 1967, the lessee was nonetheless entitled to hold the memorandum of deposit as security for payment of the arrears of instalment rentals owing. The material provision of the 'memorandum of security deposit' dated 16 August 1988 reads as follows:

> I/We the undersigned [meaning the lessee] have this day deposited with you the sum of Ringgit Twenty-Five Thousand and Eighty-Six only ($25,086) as security for the performance of the terms and conditions contained in the equipment lease agreement dated 16 August 1988.
>
> I/We agree that this deposit is refundable to me/us free of interest at this expiry of the said agreement *and only on complete satisfaction* of each and every term and condition contained therein. (Emphasis added.)

Thus, the deposit was placed as security for the performance of the terms and conditions of the lease agreement and was refundable at the expiry of the lease agreement, but only upon full satisfaction of all the terms and conditions therein contained.

The relevant provisions of cl 11.3 of the lease agreement stipulates as follows:

> 11 The Lessor shall be entitled simultaneously with the execution of this Lease Agreement to collect from the Lessee thereof a deposit or a prepaid rent as described in item (6) of the Schedule as the Lessor shall in its absolute discretion decide and such deposit or prepaid rent will be retained by the Lessor and dealt with in the manner as follows:
>
> 11.1 ...
>
> 11.2 ...
>
> 11.3 Notwithstanding the provisions of sub-clauses 11.1 and 11.2 hereof if the Lessee is in default under any of the provisions of this Lease Agreement (including the events referred to in Clause 12 below) then the Lessor shall be entitled at its absolute discretion to apply the Deposit and/or Prepaid Rent or any part thereof against all and any monies damages arrears of Rent and/or Agreed Loss Value as the Lessor shall deem fit ...

Clause 11.3 quoted above referred to the 'the events' enumerated in cl 12 of the lease agreement. For the purpose of the present case under appeal, we need only single out three events ie:

(1) If 'the lessee shall default in the payment of any sums payable under the lease; or' (cl 12.1(a))

(2) If 'the lessee shall fail to observe or perform any of the provisions of this lease, whether express or implied; or' (cl 12.1(b))

A (3) if 'the lessee ... shall go into liquidation (whether voluntarily or compulsorily); or' (cl 12.1(d))

(4) if 'winding-up petition shall be filed against the lessee; or' (cl 12.1(e)).

It is common ground that a winding-up petition was filed against the lessee on 2 December 1989 and a winding-up order had been made against it on B 4 April 1990 (cl 12.1(d) and (e)). It is also obvious that the lessee had breached the terms of the lease agreement through default on its part in making payment of the monthly rentals (cl 12.1(a) and (b)). In the circumstance and having regard to the provisions contained in cl 11.3 read with the events specified in cl 12.1(a), (b), (d) and (e) quoted above, it is, C in our view, clear that the lessor was entitled to hold the deposit RM25,086 paid under the 'memorandum of security deposit' dated 16 August 1988 and the prepaid rental RM1,605 as security, and that the lessee was a secured creditor to the extent of the deposit and the prepaid rental, ie RM26,691.

D (3) *Undue preference and avoidance of set-off*

In the light of our finding as to the validity of the set-off, we find no substance in the contention of the lessee that there had been undue preference in favour of the lessor under s 293 of the Companies Act 1965 rendering the set-off liable to be avoided. Nor do we find it necessary to E invoke s 41 of the Bankruptcy Act 1967. As we have stated earlier, the lessor was entitled to set-off the security sum against the amount owed by the lessee to the lessor.

For the above reasons, we allow the appeal. The order of the learned trial judge made on 8 December 1993 is set aside. The motion is dismissed with costs here and below to be paid out of the assets of the lessee, JB F Precision Moulding Industries Sdn Bhd. In the absence of an agreement, such costs may be taxed.

Appeal allowed with costs.

G Reported by Hadmin Zahar Habib Muhamad

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